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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

MARK AUSSIEKER, individually
and on behalf of all others similarly
situated,

Plaintiffs,

v.

**GOLDWATER BANK, NATIONAL
ASSOCIATION; DOES 1-10**
Inclusive,

Defendant.

Case No.:

CLASS ACTION

**COMPLAINT FOR DAMAGES
AND INJUNCTIVE RELIEF
PURSUANT TO THE
TELEPHONE CONSUMER
PROTECTION ACT, 47 U.S.C. §
227, ET SEQ.**

JURY TRIAL DEMANDED

INTRODUCTION

1. MARK AUSSIEKER (“Plaintiff”), brings this Class Action Complaint for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of GOLDWATER BANK, NATIONAL ASSOCIATION (“Defendant”), in negligently contacting Plaintiff on Plaintiff’s cellular telephone, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.*, (“TCPA”) and related regulations. Plaintiff alleges as follows upon personal knowledge as to himself and his own acts and

1 experiences, and, as to all other matters, upon information and belief, including
2 investigation conducted by his attorneys.

3 2. The TCPA was designed to prevent calls and messages like the ones
4 described within this complaint, and to protect the privacy of citizens like Plaintiff.
5 “Voluminous consumer complaints about abuses of telephone technology – for
6 example, computerized calls dispatched to private homes – prompted Congress to
7 pass the TCPA.” *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012).

8 3. In enacting the TCPA, Congress intended to give consumers a choice
9 as to how creditors and telemarketers may call them, and made specific findings
10 that “[t]echnologies that might allow consumers to avoid receiving such calls and
11 messages are not universally available, are costly, are unlikely to be enforced, or
12 place an inordinate burden on the consumer. TCPA, Pub.L. No. 102–243, § 11.
13 Toward this end, Congress found that

14
15 [b]anning such automated or prerecorded telephone calls to the home,
16 except when the receiving party consents to receiving the call or when
17 such calls are necessary in an emergency situation affecting the health
18 and safety of the consumer, is the only effective means of protecting
telephone consumers from this nuisance and privacy invasion.

19 *Id.* at § 12; see also *Martin v. Leading Edge Recovery Solutions, LLC*, 2012 WL
20 3292838, at* 4 (N.D.Ill. Aug. 10, 2012) (citing Congressional findings on TCPA’s
21 purpose).

22 4. Congress also specifically found that “the evidence presented to the
23 Congress indicates that automated or prerecorded calls are a nuisance and an
24 invasion of privacy, regardless of the type of call....” *Id.* at §§ 12-13. See also,
25 *Mims*, 132 S. Ct. at 744.

26 5. In a recent decision, the Supreme Court interpreted the term
27 “automatic telephone dialing system” and held that “[t]o qualify as an ‘automatic
28 telephone dialing system,’ a device must have the capacity either to store a

1 telephone number using a random or sequential generator *or* to produce a telephone
2 number using a random or sequential number generator.” *Facebook, Inc. v. Duguid*,
3 141 S.Ct. 1163 (2021) (emphasis added).

4 6. In *Duguid*, the Supreme Court provided an example of such systems,
5 stating: “For instance, an autodialer might use a random number generator to
6 determine the order in which to pick phone numbers from a preproduced list. It
7 would then store those numbers to be dialed at a later time.” *Id.* at 1171-72 fn. 7.

8 7. Further, both *Duguid* and the legislative history of the TCPA are clear
9 that the original focus on prerecorded voice technology prohibition was the fact
10 that such communications involved agentless calls, not on the question of whether
11 a literal voice was used during those agentless calls. *See* Hearing Before the
12 Subcommittee on Communications of the Committee on Commerce, Science and
13 Transportation, United States Senate One Hundred Second Congress First Session
14 July 24, 1992, Testimony of Robert Bulmash and Steve Hamm at pg 11; 7 FCC
15 Rcd. 8752 (F.C.C. September 17, 1992).

16 8. The Sixth Circuit has also recognized this distinction: “Congress drew
17 an explicit distinction between ‘automated telephone calls that deliver an artificial
18 or prerecorded voice message’ on the one hand and ‘calls place by ‘live’ persons’
19 on the other.” *Ashland Hosp. Corp. v. Serv. Employees Int’l Union, Dist. 1199*
20 *WV/KY/OH*, 708 F.3d 737,743 (6th Cir. 2013).

21 9. Similarly, the FTC has observed that “prerecorded calls are by their
22 very nature one-sided conversations, and if there is no opportunity for consumers
23 to ask questions, offers may not be sufficiently clear for consumers to make
24 informed choices before pressing a button or saying yes to make a purchase.” 73
25 FR 51164-01, 51167 (Aug. 29, 2008).

26 27 JURISDICTION AND VENUE

28 10. Jurisdiction is proper under 28 U.S.C. § 1331 because this action

1 arises under a federal statute, namely the Telephone Consumer Protection Act, 47
2 U.S.C. § 227, *et seq.*

3 11. Venue is proper in the United States District Court for the Eastern
4 District of California pursuant to 18 U.S.C. § 1391(b) and 1441(a) because
5 Defendant does business within the state of California and Plaintiff resides within
6 this district.

7 **PARTIES**

8 12. Plaintiff is, and at all times mentioned herein, was a citizen and
9 resident of the State of California, County of Sacramento. Plaintiff is, and at all
10 times mentioned herein was, a “person” as defined by 47 U.S.C. § 153 (39).
11 Plaintiff was physically in California at the time he received the alleged text
12 messages from Defendant.

13 13. Plaintiff is informed and believes, and thereon alleges, that Defendant
14 is a National Association. Defendant, and all of its agents, are and at all times
15 mentioned herein were “persons,” as defined by 47 U.S.C. § 153 (39). Plaintiff
16 alleges that at all times relevant herein Defendant conducted business in the State
17 of California and in the County of Sacramento, and within this judicial district.

18 **FACTUAL ALLEGATIONS**

19 14. At all times relevant, Plaintiff was a citizen of Sacramento County,
20 and a citizen of the State of California. Plaintiff is, and at all times mentioned
21 herein was a “person” as defined by 47 U.S.C. § 153 (39).

22 15. Defendant is, and at all times mentioned herein was, a “person,” as
23 defined by 47 U.S.C. § 153 (39).

24 16. At all times relevant Defendant conducted business in the State of
25 California and in the County of Sacramento, within this judicial district.

26 17. On or about May 20, 2021, Plaintiff received a text message from
27 Defendant on his cellular telephone number ending in -8006.

28 18. Specifically, the text message read:

1 GW Bank offers FHA/VA/Conv & Jumbo Construction &
2 Renovation for your clients up to \$1M! Text Greg @
3 415.205.8858 for information. Site: <https://t.ly/DRzs> Reply
4 STOP to Opt-Out

5 19. Defendant did not have Plaintiff's prior express consent to contact him
6 on his cellular phone.

7 20. Based on the content and format of these text messages, Plaintiff
8 alleges that they were sent via Defendant's SMS Blasting Platform, i.e., an
9 "automatic telephone dialing system," ("ATDS") as defined by 47 U.S.C. § 227
10 (a)(1) as prohibited by 47 U.S.C. § 227 (b)(1)(A).

11 21. The text message sent to Plaintiff's cellular telephone was not sent by
12 a live agent and thus created a one-sided conversation in which Plaintiff could not
13 receive a response to her questions and/or concerns. The text message also was sent
14 in an automated fashion as a result of computerized campaigns that were pre-
15 programmed in advance to send messages out to large groups of consumers all at
16 once, either sequentially or via algorithmic dialing, i.e. in an automated fashion by
17 a computer.

18 22. In Merriam Webster's Dictionary, "voice" is defined as "an
19 instrument or medium of expression." It defines "artificial" as "humanly
20 contrived...often on a natural model : MAN-MADE" and "lacking in natural or
21 spontaneous quality."

22 23. The messages sent to Plaintiff by Defendant using the SMS blasting
23 platform employed a text message as an instrument or medium of expression to
24 deliver an automatic message drafted in advance of being sent, i.e. that of an SMS
25 message, to convey a telemarketing communication to Plaintiff. SMS blasting
26 platforms are man-made humanly contrived programs which allow companies to
27 blast out such messages via non-spontaneous methods, i.e. automated methods
28 similar to that of an assembly line in a factory. Such SMS blasting devices are

1 incapable of spontaneity, as they must be programmed by the operator to
2 automatically send messages out, *en masse*, pursuant to preprogrammed
3 parameters.

4 24. Accordingly, Defendant's messages utilized an "artificial voice" as
5 prohibited by 47 U.S.C. § 227(b)(1)(A).

6 25. In Merriam Webster's Dictionary, "prerecorded" is defined as
7 "recorded in advance." "Recorded" is defined as "to set down in writing." The
8 text message sent to Plaintiff's cellular telephone via an SMS blasting platform was
9 set down in writing in advance by Defendant, whose employees wrote out the
10 standard automated messages that were to be sent to Plaintiff and other class
11 members, and by way of preprogrammed SMS blasting, entered the prerecorded
12 message into the SMS Blasting platform, and thereafter sent these messages
13 pursuant to scheduled blasts that were programmed by Defendant. Thus, Defendant
14 employed a text message as an instrument or medium of expression to deliver a
15 prerecorded message drafted in advance of being sent.
16

17 26. Thus, Defendant's messages utilized a "prerecorded voice" as
18 prohibited by 47 U.S.C. § 227(b)(1)(A).

19 27. The telephone number that Defendant, or their agent texted were
20 assigned to a cellular telephone service for which Plaintiff incur charges for
21 incoming texts pursuant to 47 U.S.C. § 227 (b)(1).

22 28. These text messages constituted calls that were not for emergency
23 purposes as defined by 47 U.S.C. § 227 (b)(1)(A)(i).

24 29. Plaintiff was never a customer of Defendant and never provided his
25 cellular telephone number to Defendant for any reason whatsoever. Accordingly,
26 Defendant and their agents never received Plaintiff's prior express consent to
27 receive unsolicited text messages, pursuant to 47 U.S.C. § 227 (b)(1)(A).
28

1 30. Such text messages constitute solicitation calls pursuant to 47 C.F.R.
2 § 64.1200(c)(2) as they were attempts to promote or sell Defendant's services.

3 31. These text messages by Defendant, or its agents, violated 47 U.S.C. §
4 227(b)(1).

5 **CLASS ACTION ALLEGATIONS**

6 32. Plaintiff brings this action on behalf of himself and on behalf of and
7 all others similarly situated, as a member of the proposed Class.

8 33. Plaintiff represents, and is a member of, the Class, defined as follows:
9 all persons within the United States who received any unsolicited text messages
10 sent using an ATDS or an artificial or prerecorded voice from Defendant, which
11 text message was not made for emergency purposes or with the recipient's prior
12 express consent within the four years prior to the filing of the Complaint through
13 the date of class certification.

14 34. Defendant and its employees or agents are excluded from the Class.
15 Plaintiff does not know the number of members in the Class, but believes the Class
16 members number in the thousands, if not more. Thus, this matter should be
17 certified as a Class action to assist in the expeditious litigation of this matter.

18 35. This suit seeks only damages and injunctive relief for recovery of
19 economic injury on behalf of the Class, and it expressly is not intended to request
20 any recovery for personal injury and claims related thereto. Plaintiff reserves the
21 right to expand the Class definition to seek recovery on behalf of additional persons
22 as warranted as facts are learned in further investigation and discovery.

23 36. The joinder of the Class members is impractical and the disposition of
24 their claims in the Class action will provide substantial benefits both to the parties
25 and to the court. The Class can be identified through Defendant's records or
26 Defendant's agents' records.

27 37. Plaintiff and members of the Class were harmed by the acts of
28 Defendant in at least the following ways: Defendant, either directly or through their

agents, illegally contacted Plaintiff and the Class members via their cellular telephones by using marketing and text messages, thereby causing Plaintiff and the Class members to incur certain cellular telephone charges or reduce cellular telephone time for which Plaintiff and the Class members previously paid, and invading the privacy of said Plaintiff and the Class members. Plaintiff and the Class members were damaged thereby.

38. There is a well-defined community of interest in the questions of law and fact involved affecting the Class members. The questions of law and fact common to the Class predominate over questions which may affect individual Class members, including the following:

- a) Whether, within the four years prior to the filing of this Complaint through the date of class certification, Defendant or their agents sent any text messages (other than a message made for emergency purposes or made with the prior express consent of the called party) to a Class member using any automatic dialing system or artificial or prerecorded voice to any telephone number assigned to a cellular phone service;
- b) Whether Plaintiff and the Class members were damaged thereby, and the extent of damages for such violation; and
- c) Whether Defendant and their agents should be enjoined from engaging in such conduct in the future.

39. As a person that received at least one solicitation text message without Plaintiff's prior express consent, Plaintiff is asserting claims that are typical of the Class. Plaintiff will fairly and adequately represent and protect the interests of the Class in that Plaintiff has no interests antagonistic to any member of the Class.

40. Plaintiff and the members of the Class have suffered irreparable harm as a result of the Defendant's unlawful and wrongful conduct. Absent a class action, the Class will continue to face the potential for irreparable harm. In addition, these violations of law will be allowed to proceed without remedy and Defendant will likely continue such illegal conduct. Because of the size of the

1 individual member's claims, few, if any, members of the Class could afford to seek
2 legal redress for the wrongs complained of herein.

3 41. Plaintiff has retained counsel experienced in handling class action
4 claims and claims involving violations of the Telephone Consumer Protection Act.

5 42. A class action is a superior method for the fair and efficient
6 adjudication of this controversy. Class-wide damages are essential to induce
7 Defendant to comply with federal and California law. The interest of the Class
8 members in individually controlling the prosecution of separate claims against
9 Defendant are small because the maximum statutory damages in an individual
10 action for violation of privacy are minimal. Management of these claims is likely
11 to present significantly fewer difficulties than those presented in many class claims.

12 43. Defendant has acted on grounds generally applicable to the Class,
13 thereby making appropriate final injunctive relief and corresponding declaratory
14 relief with respect to the Class as a whole.

15
16 **FIRST CAUSE OF ACTION**
17 **NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT**
18 **47 U.S.C. § 227(B)**

19 44. Plaintiff incorporates by reference all of the above paragraphs of this
20 Complaint as though fully stated herein.

21 45. The foregoing acts and omissions of Defendant constitute numerous
22 and multiple negligent violations of the TCPA, including but not limited to each
23 and every one of the above-cited provisions of 47 U.S.C. § 227(b).

24 46. As a result of Defendant's negligent violations of 47 U.S.C. § 227(b),
25 Plaintiff and Class members are entitled to an award of \$500.00 in statutory
26 damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

27 47. Plaintiff and Class members are also entitled to and seek injunctive
28 relief prohibiting such conduct in the future.

**SECOND CAUSE OF ACTION
KNOWING AND/OR WILLFUL VIOLATIONS OF THE
TELEPHONE CONSUMER PROTECTION ACT
47 U.S.C. § 227(B)**

48. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

49. The foregoing acts and omissions of Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227(b).

50. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227(b), Plaintiff and Class members are entitled to an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

51. Plaintiff and Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

PRAYER FOR RELIEF

Wherefore, Plaintiff respectfully requests the Court grant Plaintiff, and members of the Classes, the following relief against Defendant:

**FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF
THE TCPA, 47 U.S.C. § 227(B)**

- As a result of Defendant's negligent violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for herself and each ATDS Class member \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

**SECOND CAUSE OF ACTION FOR KNOWING AND/OR WILLFUL VIOLATION OF
THE TCPA, 47 U.S.C. § 227(B)**

- As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for herself and each ATDS Class member \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).
- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.
- Any other relief the Court may deem just and proper.

TRIAL BY JURY

52. Pursuant to the seventh amendment to the Constitution of the United States of America, Plaintiff is entitled to, and demands, a trial by jury.

Dated: May 19, 2022

Respectfully submitted,

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By: s/ Todd M. Friedman
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